

COMMONWEALTH OF THE BAHAMAS

2019/COM/gen/00005

IN THE SUPREME COURT

COMMERCIAL DIVISION

IN THE MATTER OF THE COMPANIES ACT (THE ACT)

AND

IN THE MATTER NAVETTE BROADCASTING &
ENTERTAINMENT CO LTD

BETWEEN:

VANN FERGUSON
CHERYL BRAYNON

Complainant pursuant to s 280 of the Act)

First Plaintiffs

NAVETTE BROADCASTING & ENTERTAINMENT CO. LTD
(The company)

Second Plaintiffs

AND

FRANK RUTHERFORD
BLOSSIE SMITH

(Sued in their capacity as Directors of the Company)

First Defendants

AND

PARAMOUNT SYSTEMS LTD
(Sued in its capacity as an affiliate of the Company)

Second Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Kahlil Parker KC, Roberta Quant for the Plaintiffs

Judith Smith for the First Defendant

V. Moreno Hamilton for the Second Defendant

Date of Hearing: 30th September, 2022

DECISION

FACTUAL SUMMARY

1. By Summons filed 30th June 2022, the Second Defendant seeks the following relief:

- (1) That this action be dismissed as against the Second Defendant on the grounds that this action or the Statement of Claim filed herein discloses no reasonable cause of action as against the Second Defendant or is scandalous, frivolous or vexatious and an abuse of the process of the Court.
 - (2) In the alternative, that paragraphs 1, 2, 3, 11, 13, 15, 18, 20, and 21 of the Statement of Claim be amended or struck out as scandalous or frivolous or vexatious or tending to prejudice or embarrass or delay the fair trial of this action or irregular in that they do not comply with the Rules of the Supreme Court. The cost of an occasioned by this application be paid by the Plaintiffs to the Second Defendant to be taxed if not agreed.
2. The First Plaintiffs are officers, directors and beneficial shareholders of the Second Plaintiff. The First Defendants are directors and beneficial shareholders in the Second Plaintiff. The First Plaintiffs and the First Defendants joined together and formed Navette, which was incorporated on August 28, 2009, for the purpose of acquiring an Individual Spectrum License to be issued by URCA to operate an FM Radio Station.
 3. That license was issued to the First Defendants in January 2010, pursuant to which Navette carried on business as ZSR Sports Radio 103.5 FM. In or about February 2017 the First Defendants allegedly entered into agreements for the purpose of transferring that license to the Second Defendant without the knowledge of the Plaintiffs. Application was then made to URCA for approval of a change of control of ZSR Sports Radio 103.5 FM on behalf of Mr. Frank Smith and Mrs. Blossie Smith. URCA later reissued the license to the Second Defendant, Paramount Systems Limited.

SECOND DEFENDANT'S CASE

4. The Second Defendant contends that URCA issued the license to the First Defendants, who then sold that license to the Second Defendant, and URCA as Regulator approved the transfer of license to the Second Defendant. The Second Defendant therefore contend that they purchased the license from the party that had the legal title to the license, and as such engaged in no illegal activity, and particularly no conspiracy with URCA as alleged by the Plaintiff. They further note that URCA has not been made a party to this action. They therefore submit that it is plain and obvious based on the facts of this case and the pleadings of the Plaintiffs that the claim against the Second Defendant must fail.
5. The Second Defendant notes section 280 of the Companies Act 1992 which reads as follows:
 - “(1). A complainant may apply to the court for an order against a company or a director or officer of that company to restrain oppressive action.

(2). If upon an application under subsection (1), the court is satisfied that in respect of a company or any of its affiliates:-

- (a) any act or omission of the company or any of its affiliates effects a result;
- (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
- (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly oppressive to, or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director, or officer of the company, the court may make an order to rectify the matter complained of.

(3). In connection with an application under this section, the court may make any interim or final order it thinks fit, including...”

6. The Second Defendant also cites the definition of “affiliates” in The Companies Act 1992 section 1 as follows: includes in relation to another company, a company that directly or indirectly controls, is controlled by, or is under common control, with such other company, and hence is considered to be a member of the same group of companies.
7. The Second Defendants submits that an action can only be brought against a company or a director or officer of that company, of which the Second Defendant is neither. They further contend that the application can only brought with respect to the actions of the company or its affiliates, and submit that again the Second Defendants is neither. The Second Defendant therefore questions the standing of the Plaintiffs to pursue a section 280 action against the Second Defendant, as the Second Defendant is not an affiliate of Navette, and the Plaintiffs are not shareholders or directors of the Navette.
8. The Second Defendants further submits that, while it is clear that declarations are being sought against the First Defendant, it is unclear what relief is being sought against the Second Defendants, and that the oppression complained of must have been committed by URCA, which is not a party to this action, in transferring the licence. They therefore submit that it is plain and obvious that the action against the Second Defendants is unsustainable.
9. With respect to the Statement of Claim, the Second Defendants submits that the same does not enable the Second Defendant to know or understand the case it has to answer, as it purports to reference allegations of conspiracy against the Second Defendant but no particulars of the alleged conspiracy are provided or clearly pleaded. They also contend that it is unclear on what basis the Plaintiffs allege that the Second Defendant is an affiliate of Navette, nor is it clear on what basis the Plaintiffs assert to be Shareholders or Directors of the Second Defendant.

PLAINTIFF'S CASE

10. The Plaintiffs contend that the 1st Defendants are the controlling minds, directors, and beneficial owners of both Navette and the Second Defendant, and as such the Second Defendant can be considered an affiliate or affiliated company in relation to Navette. They therefore submit that the Plaintiffs clearly have standing to bring the action.
11. The Plaintiffs rely on **Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688 at 696**, where the Court says "I think a reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered.' They submit that once a claimant pleads a case which raises some question fit to be determined by the Court they overcome this hurdle, and that an examination of the Statement of Claim shows that the Plaintiffs seek redress for the harm they allegedly suffered, and continue to suffer, as a result of the unfair and/or oppressive conduct of the 1st Defendants in their capacity as directors, officers, and beneficial owners of Navette, and the Second Defendant in its capacity as an affiliate of Navette. The Plaintiffs therefore maintain that an allegation of oppressive conduct, or unfair disregard, on the part of a company, a director or officer of the company, or an affiliate of the company raises a prima facie case, the live issue being whether the complainant is able to satisfy the Court that the actions complained of are in fact oppressive or unfair.
12. The Plaintiffs insist that the allegations pleaded in the Statement of Claim are necessary in order for the Plaintiffs to obtain the relief prayed for, and suggest that the Second Defendant has failed to provide any evidence in support of the bare allegation that the Statement of Claim, or even some part thereof, is scandalous in some way, in the absence of which evidence the application ought not to be entertained.
13. The Plaintiffs likewise submit that the contention that the action is frivolous or vexatious or an abuse of the process of the court is unsubstantiated, as no evidence in support has been provided by the Second Defendant.
14. With respect to the intimation that this action is an abuse of process, the Plaintiffs submit firstly that this allegation is unsubstantiated, and secondly that, given the wide range of powers available to the court pursuant to section 280, including the power to compensate an aggrieved person, the action clearly is not an abuse of process.
15. The Plaintiffs submit that the 1st Defendants as directors of Navette owe that company a fiduciary duty, and that the Plaintiffs are therefore entitled to pursue an action for any alleged breaches of that fiduciary duty, the successful conclusion of which would entitle the Plaintiffs to trace and recover the fruits of that breach. Again, they submit that the action is well founded, and not an abuse of process.

16. Finally, the Plaintiffs invite the Court to resist the importuning of the Second Defendant to embark on a trial of the matter by delving deeply into evidence, and note that the Court on such an application is to look only at the pleadings in the matter.

DISCUSSION

17. This application is brought pursuant to Order 18 Rule 19 of the Rules of the Supreme Court, which reads as follows:

19 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action or anything in any pleading or in the indorsement, on the ground that

(a) it discloses no reasonable cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous, or vexatious, or

(c) it may prejudice, embarrass, or delay the fair trial of the action or

(d) it is otherwise an abuse of the process of the court

And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be"

18. The exercise of the Court's discretion on an application such as the present was considered extensively in **Sandyport Home Owner's Association v R. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014**, where beginning at paragraph 15 the court said as follows:

"15. The approach to the exercise of the discretion under Ord. 18, r. 19 which corresponds to the English Ord. 18, r.19 (which was an amalgamation of the former RSC, Ord. 19, r. 27 and the former RSC, Ord 25, r 4) is best exemplified in *Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd.* [1899] 1 QB 86 a case involving a claim brought by the plaintiff against the defendant alleging libel by disparagement of the plaintiffs goods by means of a circular which had been published by the defendant and issued in China and Japan.

16. In *Hubbuck*, the defendant applied to strike out the plaintiffs claim on the ground that the pleadings disclosed no reasonable cause of action. The defendant appealed the judge's refusal to strike out the plaintiffs statement of claim. After considering the allegations in the statement of claim together with the circular complained of, the Court of Appeal allowed the appeal and struck out the plaintiffs claim.

17. The following extract from the decision of Lindley M.R., who delivered the Court's decision, is instructive as to the approach used:

"The truth is that the defendant's circular when attentively read comes to no more than a statement that the defendant's white zinc is equal to, and indeed, somewhat better than the plaintiffs. Such a statement, even if untrue and the cause of loss to the plaintiffe, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not

enough to convert what is prima facie lawful into a prima facie unlawful statement. It is not unlawful to say that one's goods are better than other peoples...

The statement of claim then as it stands, shews no reasonable cause of action; and the only other question is whether the plaintiff should have liberty to amend...as there is no reason to suppose that the plaintiff can improve their case by any amendments they can make, the Court ought to exercise the power conferred upon it by Order 25 r. 4 and order judgment to be entered for the defendants..."

The authorities in the Annual Practice also show that so long as the statement of claim or the particulars disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. See *Wenlock v. Moloney* [1965] 2 All ER 871 discussed below."

19. At paragraph 34 the court goes on to excerpt the following from **Wenlock**:

34. In *Wenlock* the English Court of Appeal sought to explain the proper approach to the exercise of the discretion under the rule. The following excerpts from the judgments of Sellers and Danckwerts LJJ. respectively are particularly appropriate in the circumstances of the current appeal and are, in my view, worthy of reproduction:

"What has taken place here is, I think, without precedent and far from encouraging it.. I would disapprove it. It is not the practice in the civil administration of our courts to have a preliminary hearing, as it is in crime.... There have been cases where affidavits have been used to show that an action was vexatious or an abuse of the process of the court but not, as far as we have been informed, or as I know, where it has involved the trial of the whole action when facts and issues had been raised and were in dispute. To try issues in this way is to usurp the function of the trial judge..." [per Sellers LJ. at p. 873]

35. Danckwert LJ put the matter no less forcefully in the following terms:

"There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross- examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power..." [at p. 874] [Emphasis added]

20. As a starting point for a consideration of this matter, I am reminded that the Court is constrained to look only at the pleadings. In those pleadings, it is alleged that the First Defendants are directors of both Navette and the Second Defendant. The pleadings therefore set out a basis for the contention that they are affiliated companies, which gives the Plaintiffs standing to bring the action, pursuant to the definition of affiliated companies

in the Act. I note further that the definition of complainant includes “**(c) any other person, who in the opinion of the court is a proper person to institute an action under this Part.**” The court is therefore vested with a wide discretion as to who would be a proper complainant. In the circumstances of this case, given the allegations in the pleadings that a scheme was devised by persons who were directors of Navette to divest that company of its sole valuable asset, and to transfer that asset to Paramount, of which those same persons are shareholders and directors, I would be prepared to hold that, on the pleadings, the Plaintiffs are proper complainants. To do otherwise would mean that Paramount would be the beneficiary of what are alleged to be improper actions on the part of the First Defendants. I note also that it has been intimated that Paramount is a bona fide purchaser. That may well be so, but that is a determination to be made after a consideration of evidence, as opposed to on the pleadings.

21. In the instant case counsel has submitted that portions of the Statement of Claim are scandalous, frivolous, and vexatious. There has been no condescension to specifics of how the pleadings are scandalous, frivolous, or vexatious, other than to note that entities are mentioned which are not parties to the proceedings. Having reviewed the Statement of Claim, I note that there are allegations that other entities were used to facilitate the creation of the Second Defendant and the transfer of the licence. There are also allegations of conversations with persons who are affiliated with those entities. While these persons and entities are not parties, the allegations appear to be essential to making out the claim of the Plaintiffs. The allegations are clearly not frivolous, and it must also be said that merely naming others is not enough to render a pleading scandalous or vexatious.
22. Counsel for the Second Defendant has also suggested that there are allegations of corrupt practices, and has deplored the making of such an allegation without evidence. This submission implicitly recognizes that this is a matter of evidence, which may or may not be adduced at trial, but which is beyond the scope of the court’s examination at this stage.
23. In all the circumstances, I am unable to say that the Statement of Claim discloses no reasonable cause of action, as there is, in my view, a reasonable chance of success. I therefore decline to strike out the Statement of Claim on this basis.
24. Counsel has also urged that paragraphs 1, 2, 3, 11, 13, 15, 18, 20, and 21 be struck out. Having reviewed the mentioned paragraphs, I see no basis for the application to have those paragraphs struck out. Paragraphs 1, 2, and 3 merely state what the Plaintiffs say are the relationships between the Plaintiffs and the First Defendants, and how Navette came into being. Paragraph 11 sets out the nature of the allegation with respect to the Second Defendant. Paragraph 13 sets out interactions between the First Plaintiff, the First Defendant, and persons affiliated with the Second Defendant, which sets a background for the eventual acquisition of the licence by the Second Defendant. Paragraph 15 also contains allegations of interactions between the Plaintiff and a person affiliated with the Second Defendant with respect to failed negotiations to purchase the licence, which was eventually transferred to a company allegedly linked to that person through another company.

Paragraph 18 alleges that the licence was transferred by URCA, and to whom, while paragraph 20 merely sets out the conduct of the Second Defendant after acquiring the licence. Finally paragraph 21 alleges that the Plaintiffs have suffered loss as a result of the actions of the First Defendants in concert with the Second Defendants.

25. It is again emphasized that at this stage, these paragraphs contain allegations. It will be a matter for proof at trial whether the allegations are made out, and what conclusions can be drawn from the evidence by the trial court, but I am unable to see at this stage, and in the absence of any specifications as to how the impugned paragraphs are frivolous, vexatious, or abusive, or might delay or prejudice the fair trial of this matter, any basis for the application to have these paragraphs struck or amended.
26. In all the circumstances of this case, and in concord with the admonition to avoid embarking on a preliminary hearing of this matter, I decline to strike out the Statement of Claim in its entirety, or the mentioned paragraphs, or to order that they be amended.

Dated this 30th day of January, A.D. 2023



Neil Brathwaite

Justice